BOARD OF APPEALS CASE NO. 007	*	**BEFORE THE**
APPLICANT: Fallston Village, Inc.	*	**ZONING HEARING EXAMINER**
REQUEST: Rezone 6± acres from AG to B1; southside of MD Route 152, 1,000 feet west of Pleasantville Road, Fallston	*	**OF HARFORD COUNTY**
	*	Hearing Advertised Aegis: 8/22/85 & 8/29/85 Record: 8/21/85 & 8/28/85
HEARING DATE: September 24, 1985	*	

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ZONING HEARING EXAMINER'S DECISION

The Applicant, Fallston Village, Inc., is the owner of a parcel containing 11.71 acres, situated on the south side of MD Route 152, 1,000 feet west of Pleasantville Road, in Fallston. The parcel has been zoned A1 or Agricultural since 1957. The petition for zoning reclassification initially filed by the Applicant sought a rezoning from AG to B3. By letter dated June 28, 1985, from Applicant's counsel, the petition for zoning reclassification was amended to reduce the acreage requested to be rezoned from 11.5 acres to 6 acres. The Applicants further sought to amend the petition to have the property reclassified to B1 instead of B3.

The hearing was held on September 24, 1985. Prior to the submission of testimony, the Applicant stipulated with regard to two sections of the Staff Report of the Department of Planning and Zoning. That Report establishes that to the north of the subject property, land is zoned RR (Rural Residential); to the south, the land use is both Residential and Agricultural; to the east, the land use is Residential, vacant, and Commercial; and to the west, the land use is Agricultural. The Report also reflects that that there is commercial development at the intersection of MD Route 152 and Pleasantville Road, approximately 1,000 feet from the property. The Master Plan calls for Rural Residential and Agricultural development.

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The Applicants base their petition upon the fact that the County Council made a mistake when it classified the property agricultural during the 1982 Comprehensive Zoning. The Applicant submitted a plat, marked as "Petitioner's Exhibit No. 1", indicating the 6 acres sought to be rezoned. There is no question that there exists upon the property both non-conforming uses and principally permitted uses. The property is presently improved by two buildings. The old building, as described by the witnesses, contains a dry cleaning and laundry pick-up station, a television repair shop, and a warehouse. The new building is used as a nursery and is owned by Mr. and Mrs. Joseph Webb. The Department of Planning and Zoning and the People's Counsel agree that the commercial uses presently existing on the property in the old building are either non-conforming, permitted by the Code in the AG District, or they have Board of Appeals approval which was the subject of previous applications filed by the owners. In essence, the Applicant contends that it is a mistake to continue non-conforming uses since 1957, and that the County Council should have recognized the existence of commercial development on the property and classified the property to acknowledge the non-conforming uses. The thrust of the Petitioner's contention is that it is better to have the property zoned to reflect the current uses than to continue non-conforming uses. The Applicant submits that it intends to improve the property to derive some income, but that it is difficult to obtain a tenant under a long-term lease. It asserts that no one would develop the property, in light of the tenuous nature of a non-conforming use.

The Applicant, in its brief, asserts that the "failure to zone the tract for commercial purposes at the inception of zoning in Harford County and the failure to rezone the property now, based on the use of the property since prior to 1957 for commercial purposes, is a mistake... The issue is not the extension of commercial uses, but rather the recognition of these uses which have existed for over twenty-eight years. These uses have been permitted as non-conforming uses, however, the time has come when these uses should be officially recognized and the property zoned according to its use."

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Mervyn G. Thompson, qualified and accepted as an expert in zoning, testified that prior to the 1957 Zoning Ordinance, the property was used as a Southern States store, which supplied farmers, as well as non-farmers, in the area. It was originally built by Edmund Scarborough in 1945 and sold to Roy Lowe in 1956. Mr. Thompson noted that the Zoning Ordinance was adopted on December 5, 1957. The activity on the property was consistent with uses principally permitted within the B3 zone. He testified that all Southern States stores in the County were in the B3 zone with the exception of the subject tract. He stated that it was an oversight by the Department of Planning and Zoning to recommend that the property remain agricultural; that the property should have been rezoned; that there were existing commercial uses on the property; that it would have been a better zoning practice to zone the property to permit the uses which had existed there since 1957 rather than to continue a non-conforming use. From a zoning standpoint, a B1 classification should be the classification for the property, and that it was a mistake by the County Council to continue the non-conforming use. According to Mr. Thompson, the agricultural zone permits various commercial uses as either a Special Exception or principally permitted. The Applicant referred to the Zoning Code, indicating the principal permitted uses for the Agricultural District, and those uses which require a Special Exception. All of the Use Tables were referred to during the evidence. The Hearing Examiner notes that a creamery, highway maintenance facilities, helistops, public utility facilities, solid waste transfer stations, farmer co-ops, feed and grain mills, boarding homes and tourist homes, are all principally permitted in the Agricultural District. Mr. Thompson stated that such uses are commercial in nature rather than agricultural, and that certain uses require Special Exception in the Agricultural District. These Special Exceptions would require Board approval. These include: lab research, abattoirs, slaughter-houses, interstate and intrastate pipelines, electrical transmission lines, communi-cation and broadcasting towers and stations, aircraft landing and storage, construction services and supplies, funeral homes, health services, kennels and pet grooming, antique shops, auction houses-animal, cottage houses, country inns and resorts, group homes, nursing homes, commercial vehicle and equipment storage, farm vehicle and equipment sales and service, motor vehicle repair shops, mineral extraction and processing, and sawmills. As a zoning expert, Mr. Thompson opined that the uses permitted in the Agricultural District and those permitted as a Special Exception are commercial in nature and that it was a mistake by the County Council to have continued the non-conforming commercial uses in the Agricultural District. In many instances, the uses permitted in agricultural zoning were the same as th B1 uses.

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Mr. Joseph Waclawski, the sole stockholder of Fallston Village, Inc., testified that he intends to improve the property to derive some income, and does not intend to sell it during his lifetime. He noted that there was sufficient water on the property, which contains two wells yielding more than 60 gallons per hour. Each building contains its own separate septic system. He stated that it was difficult to obtain a tenant under a non-conforming use, and the tenants did not want to develop the property under such zoning classification. He confirmed the uses of the property in both the old and the new building. Mr. Waclawski admitted during cross-examination that during the public hearings held by the County Council, he personally appeared before the County Council and asked the Council to consider the property to be zoned commercial. He noted that he had an opportunity with his counsel to present to the County Council during the public hearings the request to rezone the entire 11 acre parcel. The County Council denied such request and, during the 1982 Comprehensive Zoning, continued the agricultural zone on the property.

Dennis Sigler, Chief, Zoning Administration and Enforcement, testified that zoning of the property as B1 would violate the Master Plan for the area, and the 1970 Land Use Plan, which designates the area as Agricultural or Rural Residential. He noted, however, that the Master Plan did not recommend the commercial development along Pleasantville Road, which has apparently developed in opposition to the Master Plan. He noted that during the 1982 Comprehensive Zoning, the owners were permitted to submit issues to the County Council. The Department of Planning and Zoning and the Planning Advisory Board recommended that the property remain agricultural, and the County Council adopted this recommendation.

At the conclusion of the report of Dennis Sigler, several protestants testified with regard to their fear of the commercialization of the area and the increase of traffic along MD Route 152.

It should be noted that in 1974 the County Council denied a similar rezoning petition for the subject property, filed by its then owner, William B. Snyder, Jr.

The Hearing Examiner cannot consider the effect of the rezoning on the commercialization of the area, or the "spin-off" effect that a rezoning will have.

Additionally, any proported effect on traffic fails to consider that traffic has substantially increased on MD Route 152. The development of this property will not substantially increase traffic sufficient to justify denial of a rezoning of the property to B1.

In Westview Park v. Hayes, 256 Md. 575, the Court of Appeals stated that,

> "it is no longer necessary to do more than restate the Maryland rule. There is a strong presumption of the correctness of original zoning of of comprehensive rezoning...and to sustain a piecemeal change therefrom, there must be strong evidence of mistake in the original zoning, or of a substantial change in conditions..."

In Agneslane Inc. v. Lucas, 247 Md. 612, the Court of Appeals referred to the burden of proof as "onerous". As noted earlier, the Applicant relies solely upon the issue of mistake. With the regard to the issue of mistake, the Court of Special Appeals in Boyce v. Sembly, 25 Md. App. 43 stated,

> "A perusal of cases, particularly those in which a finding of error was upheld, indicates that the presumption of validity accorded to a comprehensive zoning is overcome and error or mistake is established when there is probative evidence to show that the assumptions or premises relied upon by the Council at the time of the comprehensive rezoning were invalid. Error can be established by showing that at the time of the comprehensive zoning the Council failed to take into account then existing facts, or projects or trends which were reasonably foreseeable of fruition in the future, so that the Council's action was premised initially on a misapprehension...cases cited...Error or mistake may also be established by showing that events occuring subsequent to the comprehensive zoning have proven that the Council's initial premises were incorrect. As the Court of Appeals said in Rockville v. Stone, 271 Md. 655, 662, 319 A. 2d 536, 541 (1974):
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> > "On the question of original mistake, this Court has held that when the assumption upon which a particular use is predicated proves, with the passage of time, to be erroneous, this is sufficient to authorize a rezoning."...cases cited...
>
> It is presumed, as part of the presumption of validity accorded comprehensive zoning, that at the time of the adoption of the map the Council had before it and did, in fact, consider all of the relevant facts and circumstances then existing. Thus, in order to establish error based upon a failure to take existing facts or events reasonably foreseeable of fruition into account, it is necessary not only to show the facts that existed at the time of the comprehensive zoning but also which, if any, of those facts were not actually considered by the Council. This evidentiary burden can be accomplished by showing that specific physical facts were not readily visible or discernible at the time of the comprehensive zoning...by adducing testimony on the part of those preparing the plan that then existing facts were not taken into account...or by producing evidence that the Council failed to make any provision to accommodate a project, trend or need which it, itself, recognized as existing at the time of the comprehensive zoning..."

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The Applicant, Fallston Village, Inc., has failed to meet the burden of proving that the County Council failed to consider certain factors which were apparent to it at the time of the Comprehensive Zoning in 1982. Mr. Waclawski, President of Fallston Village, Inc., admitted that during the public hearings at the time of the Comprehensive Zoning, he presented all of the facts which have been presented in this hearing to the County Council for its consideration. There is also evidence that the County Council considered all of the factors which have been presented in this case. Since there has been no evidence that the County Council failed to consider facts at the time of the Comprehensive Zoning, the Hearing Examiner in this case would be doing no more than substituting his judgment for that of the County Council.

The Applicant can sustain a burden of proof with regard to mistake by showing that "specific physical facts were not readily visible or discernible at the time of the Comprehensive Zoning." In the instant case, Fallston Village, Inc. has pointed to no physical facts which were not visible or discernible to the Harford County Council. Additionally, no testimony was adduced to indicate that those who prepared the comprehensive plan did not take into account the facts that existed. It is obvious that the County Council had knowledge of the existence of the non-conforming uses on the property at the time that it considered the 1982 Comprehensive Zoning. Furthermore, there is no evidence that the Council "failed to make any provision to accommodate a project, trend or need which it, itself, recognized as existing at the time of the Comprehensive Zoning." There has been no radical change in circumstances with regard to the property since the Comprehensive Zoning in 1982, nor is there any evidence upon which the Hearing Examiner can find that the Council failed to consider the possible trend for the project or the uses existing on the property. All of the evidence presented in this case indicates that the Harford County Council, during the 1982 Comprehensive Zoning process, considered the existence of the non-conforming uses for a period of over twenty-eight years and decided, in its collective wisdom, to maintain the current zoning of the property. The mere fact that a non-conforming use has existed on the property cannot be considered as evidence of error in the original zoning. See Minor v. Shifflet, 252 Md. 158 (1967).

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The continuance of non-conforming uses in the area for such a period of time does not seem to serve either the Applicants or the surrounding residents. The owner cannot find a long term tenant for the property under the existing non-conforming use. Accordingly, since the property cannot be as financially rewarding as it might otherwise be with a principal permitted use, certain needed improvements upon the property cannot be made. The residents themselves would face no particular change in use since the existing uses on the property are B1 uses. The Applicant merely seeks to reclassify the property to B1 to reflect its current uses and the uses on the property which have existed since 1957. Nevertheless, while the Applicant presents a compelling case that the Harford County Council should have zoned the property B1, the Hearing Examiner cannot override the decision of the Harford County Council upon the same evidence that was presented before that body during the Comprehensive Zoning. Such action would be beyond the authority of the Hearing Examiner, and would be tantemount to substituting the opinion of the Hearing Examiner for that of the Harford County Council.

The Court of Special Appeals in Boyce v. Sembly, 25 Md. App. 43, p 60, reflected upon a similar situation,

> "When all is said and done, this record is totally devoid of any evidence to show that at the time of the comprehensive zoning of the subject property the Council failed to take into account any facts or circumstances then existing relevant to the subject property and its environs so that its initial assumptions and premises in determining the appropriate classification for the subject property were erroneous. Nor was there any evidence of any events occurring subsequent to the time of the comprehensive rezoning, which would show that the Council's assumptions and premises at the time of the comprehensive rezoning had been proved invalid by the passage of time."

Since the Applicant has failed to meet his burden of proving that the Harford County Council committed some error or mistake during the 1982 Comprehensive Zoning process, the Hearing Examiner must recommend denial of the petition.

Date October 29, 1985

Gregory A. Rapisarda
Zoning Hearing Examiner